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The Constitution

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There has been so much written and spoken with regard to the Constitution that it seems desirable to examine the alleged danger to the Constitution. Certainly, the country is rather generally depressed in contemplating the Constitution, and there seem to be organized forces that are attempting to depress the people. This attitude of abject pessimism has been stated recently by many writers, including James W. Beck and Judge George H. Ethridge.

In discussing the Constitution, the author will quote from the Constitution and from what the judges and others have said about it. It is proper that this be done because present Chief Justice Charles Evans Hughes, when Governor of New York State, said that we were living under a Constitution, but that this Constitution is what the judges say it is. Certainly that is true.

We may have had the notion that our Constitution came into being through great unanimity of opinion among the leaders who met at the Constitutional Convention in 1787. Nothing could be farther from the truth. It was with the greatest difficulty that the founders of our Constitution were able to compose and overcome the difficulties and remain in session long enough to finish the work. It was only by the sagacity and astuteness of Franklin and the good judgment of the chairman of the Convention, George Washington, that they were able to finish the work at all. The Constitution as finished was a series of compromises which did not express the united will, opinion, and judgment of the wiser leaders of the Convention; rather, these compromises represented what was politically possible at that time. It can truly be said that the Constitution does not represent the deliberate opinion or judgment of the men who later became the leaders in the putting of this Constitution into effect.

It should be noted also that the whole movement for a Constitution was unconstitutional. Growing out of the Annapolis Convention was the Constitutional Convention; but certainly neither the people from the various states nor the state governments themselves gave to their delegates the power to throw overboard the Articles of Confederation, which was the Constitution under which they were operating, in order to form a more "perfect union."

While it was revolutionary and unconstitutional, we are very glad that those wise men dared to do what they thought was best and which has been found to be

good. But we are not particularly concerned with the historical aspects of the Constitution; rather are we more concerned with the Constitution at the changing end, and where it grows and expands much as a flower bursts into bloom. It is this phase of the Constitution with which we are now concerned.

The Constitution itself is not a very long document; but we are especially concerned only with about two per cent of the total. There are some very significant clauses around which our interest centers at the present time. There is the contract clause and the taxing clause, the commerce clause and the "due process" clauses. Far the greater part of the constitutional difficulties of the people for three quarters of a century have arisen under these very few clauses, and it is interesting to note that some of these were never in the original Constitution. The "due process" clauses are found in the fifth and fourteenth amendments. The fourteenth amendment we have usually thought pertained to citizenship for negroes, and most of the people who were responsible for promoting the fourteenth amendment seemed to think that it was concerned with the negroes.

But during the drafting of the amendment some Congressmen, seemingly shrewder than the others, inserted the "due process" clause into the fourteenth amendment. That clause reads, "Nor shall any state deprive any person of life, liberty or property without due process of law." That amendment has been invoked hundreds of times in defense of organized business groups to protect property from regulation by states. Likewise, the fifth amendment includes a similar provision which is in effect a means of protecting property from the regulation of the Federal Government.

Now, in the "due process" clauses there are two important words, which because of the judicial interpretation of the Supreme Court, change the meaning. These two words, because of these interpretations, make the Constitution mean something very different from what it originally meant. In the first place, they are not found in the original Constitution, but rather in two of the amendments. In the next place, the Supreme Court has interpreted "property" very broadly so as to include not only physical resources and accumulations from past efforts, but the word property has come under this interpretation to include the aspects of market transactions; that is, the right to trade in the market, to buy and sell, which ordinarily we have thought of as being a personal right, has been declared to be a property right and subject, therefore, to the law of property, to the injunctions of the court, and to civil damages. That is, property under this concept means that the right to buy anything, the right to the labor market, the right to sell in the market, is a property right; and although it is not in violation of this right for one in competition to take business away from a competitor, yet it has been interpreted that if a labor group interferes with this right, it is taking away property without "due process" of law, and the courts may be put into operation to protect this property right.

The importance of this concept has been stated very well by a Federal Judge in the Minimum Wage Case, which later came up before the Supreme Court and was decided in 1923. This judge in a lower court said, "It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the *chief of these is property.*"[1]

It has always seemed astounding to the writer that any Federal Judge should state that property is more important than life or more important than liberty. But the Supreme Court in the Minimum Wage Case upheld the same point of view. Other cases could be cited which give an exalted place to property in contrast to effective liberty and in contrast to life itself.

A second word in the "due process" clauses is the word "person." After the fourteenth amendment was passed, cases began to come up under this amendment, and the courts came to hold that a corporation is a person. Of course, in legal fiction, a corporation is a person, but a cor-

[1]L. B. Boudin, *Government by Judiciary* (New York: W. Godwin Inc.), Vol. II, p. 551.

poration is much more than a person. It is comprised of many groups of persons. Most of our modern large corporations consist of groups with conflicting interests. There are the common stockholders, the preferred stockholders, the bondholders, the general creditors, the board of directors, the officers, the subordinate officers, the administrators, and the wage workers. To place the interpretation that a corporation, made up in this way, is a "person," in a court of justice, would seem to give a meaning to the Constitution that the founders certainly never intended. It would seem, also, that the promoters of the fourteenth amendment did not intend any such meaning of the word "person."

The fourteenth amendment has come to be the most troublesome part of our Constitution. During the first decade, 1867-1877, only three cases came up before the Supreme Court under this amendment and none in 1878. During the next ten years, 1879-1889, forty-six cases came up under it. After that, there was a great flood of cases. As Corwin says, "Then, following 1896, the flood burst. Between that date and the end of the 1905 term of court, two hundred and ninety-seven cases were passed upon under the amendment—substantially all under the 'due process' and 'equal protection' clauses. What was the cause of this inundation? In the main it is is to be found in the Court's ratification of the idea . . . . that the term *liberty* of the 'due process clause' was intended to annex the principles of *laissez faire* capitalism to the Constitution and put them beyond the reach of state legislative power."[2]

These cases came up in the era of trust formation, an era in which production firms were combining themselves into large corporations, holding companies, and other forms of combination. As these combinations of capital began to seek ways in which they could avoid the regulation of their affairs by the states, they found the fourteenth amendment to be very effective. As Chidsey says, "They went to Washington in droves, these sleek men with briefcases, loudly and continuously protesting that corporations were 'persons' within the meaning of the fourteenth amendment. They overspilled all sorts of state attempts to control them. And so the trusts grew and grew . . . . they jumped state lines; they laughed at legislatures, and went to Washington with cries of alarm, loudly invoking the 'due process' clause. And the learned justices obliged.

"Immediately after the Civil War this business of getting the principle of *laissez faire* firmly established as the law of the land began; and by the end of the century the Supreme Court literally was hearing these cases by the hundreds."[3]

A second main phase of the Constitution, in which we are especially interested, is in the delegation of certain powers to the Federal Government, and in other powers that are reserved for the states. By the tenth amendment, the powers that were not delegated to the Federal Government were prohibited to the Federal Government and reserved to the states or to the people. Under this system of delegated and residual powers, the states have come to exercise most of the police powers having to do with the health, safety, and morals of the people; however, with the growth of nation-wide enterprises, both good and bad, it has become impossible for the states fully to exercise their police powers in the regulation of business enterprises and in promoting safety, health, and morals.

Rather recently, it has been necessary for the Federal Government to take over the power of controlling kidnaping. There are hundreds of other problems of national scope where the police powers of the state cannot be effectively exercised, and it might well be that sufficient consideration be given to these problems, and a constitutional revision be made so that the Federal Government could effectively deal with these problems of national scope. Recently, the Supreme Court in the AAA decision, said that the regulation of agriculture was a state function rather than a federal function. It should be noted, however, that the forces surrounding agriculture, including the prices of commodities, are established on a national and international scale.

[2]Edward S. Corwin, *The Twilight of the Supreme Court* (New Haven: Yale University Press, 1934), pp. 77-78.

[3]Donald Barr Chidsey, "A Life of Roscoe Conklin," *The Gentleman from New York* (New York: Yale University Press, 1934), pp. 369-370.

It is a pretty legal fiction that this is a purely local matter. It is alleged that agriculture is not a matter of commerce; however, the court ought to consider again its analysis of this whole situation as it did in the Swift case. The result of the interpretation of delegated powers in the AAA case is that the states *actually* cannot regulate agriculture and dozens of other situations, and the Federal Government and Congress *are forbidden* to do so. The result is that the court is establishing a "no man's land" of powers which neither states nor the Federal Government can exercise. The pitiable part of this situation is that sovereignty itself is powerless to provide a remedy.

As Corwin says, "While potent to frustrate attempted solutions of the exigent problems which face the government today, it is impotent to provide solutions of its own. And such being the case, I venture to suggest that it is the plain duty of the court to give over attempting to supervise national legislative policies on the basis of a super-constitution which in the name of the Constitution, repeals and destroys that historic document."[4]

When we established the Constitution, it was thought that we were establishing a dual sovereignty, or as Corwin says a dual federalism with certain powers of sovereignty exercised by the states and other powers exercised by the Federal Government. By setting up this "no-man's land" of power, we have established a triple Federalism. Now what is the way out? Again Corwin says, "The only way to restore dual federalism as a viable method of political control in the field of industry would be to break up the industrial structure. Otherwise, except for control by the national government, only one alternative remains, and that is the restoration of the system whose beneficiaries cried up state power when they wished to check national power and cried up national power when they wished to check state power—whose dominating conception of constitutional law has all along been that of a set of devices enabling them to play both ends against the middle and thereby escape all governmental supervision."[5]

In the exercising of its power of sovereignty in regulation, Congress has found it necessary to establish various boards and commissions. Powers of administration have to be delegated to these boards and committees; otherwise, congressional power would be no more than a legal fiction, and democracy would be worse than fiction if Congress could not delegate powers to boards and commissions.

At this point, our Constitution is actually being changed. These boards and commissions comprise part of our unwritten constitution. Although the courts at first were ready to shear such boards and commissions of power to act, yet, in recent years, they have generally recognized that these boards are necessary. The Court still retains the right of final decision in matters of property under the fifth amendment or the fourteenth amendment. Under the growth of nationalism, as businesses have become large in scope, covering the whole country, the courts have permitted this growth. While the economic and social forces that operate are national in scope and business enterprises covering the nation are permitted by the courts (in spite of anti-trust laws), yet Congress was forbidden by the Supreme Court to deal effectively with many of these problems. Recently, the Supreme Court has again begun to apply the doctrine of States Rights as in the days of Chief Justice Taney. But in this expansion of the powers of the States, the Court has gone further in expanding the police powers of the states. Recently, in the Minnesota moratorium case, the Supreme Court, speaking through the words of Chief Justice Hughes, expanded the power of the states in dealing with an economic emergency. This Minnesota law attempted to give temporary relief from debt contracts. And in upholding this state law, Chief Justice Hughes said, "If state powers exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes as fire, flood, or earthquake, that power cannot be said to be non-existent when the urgent public need demands such relief is produced

[4]Edward S. Corwin, *op. cit.*, p. 182.

[5]*Ibid.*, p. 46.

by the other and economic causes."[6] By this case, it will be noted that an economic emergency is as much an act of God as flood, famine, or pestilence. The states, therefore, in spite of the obligation of contracts clause of the Constitution may exercise powers that they have not heretofore exercised.

Again, in the New York milk case, Justice Roberts in giving his opinion of the Supreme Court introduced a new factor of law as a justification for state regulation. The Court said that if competition worked against the general welfare, a state could regulate any industry so as to overcome the effects of competition.

As Justice Roberts said, "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of the commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. . . . . But there can be no doubt that upon proper occasion and by appropriate measures, the state may regulate a business in any of its aspects, including the price to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . . The courts are without authority either to declare such policy, or when it is declared by the legislative arm, to override it."[7]

In such opinions as these, the Supreme Court shows itself more liberal than state courts usually have been. State courts usually have been more conservative than the Federal Government in interpreting the Constitution. As Dean Pound said, "It is the state courts which now stand for a belated individualism and it is only in a few cases that the Federal Supreme Court has erred seriously in this particular."[8]

It would seem, therefore, that the Supreme Court is liberalizing the Constitution a little bit as far as state powers are concerned. As the states and the Federal Government have come to engage in regulation in recent years, many people have come to believe that there is more regulation than in former years. There is a myth of "laissez faire." It is assumed oftentimes that a century ago there was very little regulation and in recent years we have come to have a superabundance of it. We should note that a century ago, even under our Constitution, a given proportion of our people were in slavery and that others could be imprisoned for debt. Women had virtually no political rights and their civil rights were very few. After the Civil War, under the Homestead Act, millions of people including immigrants were regulated under this homestead policy. A century ago, organizations of labor and industries in general were considered as conspiracies, and industries in general were regulated favorably to employers. In many other ways the general run of people were restricted or regulated and it is only in recent years that through the so-called superabundance of regulations has there been an attempt made to give greater freedom and liberty to the masses of the people.

It was stated above that we were interested in the Constitution as a changing thing. The Constitution is constantly changing under the judicial interpretation which we have been noting. As Haines says, "In practice, the Constitution has been profoundly changed with only occasion-

[6] *American Political Science Review*, 1935. Vol. 29.

[7] William Yandell Elliott, *The Need for Constitutional Reform* (New York: McGraw-Hill Book Company, 1935), pp. 173-174.

[8] Charles Warren, *Supreme Court in United States History* (Boston: Little, Brown, and Company, 1923), Vol. III, p. 468.

al recourse to the difficult process of amendment. Some provisions have become obsolete. Others have been admittedly so changed by interpretation that the obvious meaning has been practically lost in a complex system of decisions each in turn modifying the original rule. A remarkably complete and well developed system of law has been built upon a few general phases of the Constitution. Our constitutional law has been progressively developed while the process has been concealed beneath language that gave little indication of the actual changes which were being made."[9]

Again, the Constitution has been changed through amendment. Amending the Constitution is not as difficult as some writers have claimed it to be. The prohibition amendment was ratified within thirteen months after it was submitted to the states and was repealed within twelve months. Each of the last five amendments was ratified within two years after being submitted. It would be quite possible for the present Congress to submit an amendment, and very likely there are proposals for constitutional change that might be readily approved if submitted to the states. Very likely the chief executive ought to have more freedom in dealing with foreign affairs and in making treaties. It would seem that the chief executive should have greater freedom and power in handling emergencies, just as Lincoln did when Fort Sumter was fired on, in calling for volunteers. Very likely the executive should have greater control over the budget. Certainly the Federal Government should have greater powers in dealing with emergencies and in controlling the national aspects of our economic and social life. The changes are badly needed if the Constitution is to maintain its rightful respect and ability to function. As Elliot says, "It does not require gift of Pythian prophecy to foresee what will happen if the constitutional system is not reshaped to modern needs. If it remains unaltered legally, it will be pulled down piece-meal by force of circumstances. An unworkable legislative system of checks and balances will be superceded in times of crisis by executive authority more and more Caesarian in character . . . . Always in a crisis of constitutional development it is the standpat conservatives who ultimately make the destruction of the system inevitable—because they demand impossible things of antiquated machinery. It is not those who would reform but those who would ossify the Constitution who bring about its destruction. They are the true begetters of fascist Caesarism."[10]

As noted above, our Constitution has been reasonably flexible and elastic through judicial interpretation and through amendments that are made from time to time. Through natural growth and custom, an unwritten constitution is arising. The Constitution says nothing about a budget or a parcel post, yet we have them. The Constitution does not provide for boards and commissions, yet we have them. The Constitution provides for an elaborate, formal, lengthy method of electing the president, yet the next day after our national election, we know who the president will be. Our unwritten Constitution, including political parties, is a reality, although not a part of the written Constitution. But of all the means of changing the Constitution, the most important is that change brought about by judicial interpretation. And in the decision of many important cases, there is little unanimous opinion of the nine justices. In nearly all important cases, there is a division of the court. Just what the court will decide to be constitutional depends upon the personnel of the court. In the recent AAA decision, the case was decided 6-3. If two justices who decided with the majority had decided otherwise, the AAA would have been constitutional. It is hardly to be supposed that the three who dissented in that case were less scholarly or sincere or capable than the six who supported the majority opinion. Whether a justice favors a particular interpretation depends not on an automatic application of a well-known prin-

[9]Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (Berkeley, California: University of California Press, 1932), p. 535.

[10]William Yandell Elliott, *op. cit.*, pp. 206-207.

ciple or law, but rather upon his social and economic philosophy, his beliefs, and his attitudes toward institutions. In the future, as in the past, the Constitution very likely will be subject to the personal inclinations of justices of the Supreme Court.

With all these possibilities of change, with this flexible set-up, with possibilities of amending the Constitution a very practical reality, there would seem to be no great danger to the Constitution. In fact, it would seem that the pessimism which prevails hardly has substantial basis.

Around the Reading Table

MORGAN, J. B. *The Psychology of the Unadjusted School Child.* The Macmillan Company, New York, 1936. 339 pp.

This is a revision of the 1924 edition of the book by the above title. It is really a treatise on mental hygiene or personality maladjustments. The author deals with various forms of childhood maladjustments under the now familiar rubrics, such as, failures, fears, memory distortions, feelings of insecurity, compensations, delinquency, daydreaming, alibi's, or defense mechanisms of various types. It is the contention of the author that these childhood maladjustments carry over into adulthood and greatly interfere with successful living on the adult level. If teachers and parents understood these childhood difficulties and helped the child make better adjustments, he would then grow to maturity with much greater assurance of adult mental health and successful living.

The main objective of all education is now generally conceded to be the development of a health-minded personality, and by this is meant one well adjusted to life. There is little doubt that teachers are not yet prepared to accomplish this fundamental objective in education.

This book should be in the hands of everyone dealing with children for it sets forth in clear style how maladjustments in childhood may be avoided.

—Rudolph A. Acher
Indiana State Teachers College

FICHANDLER, ALEXANDER, LOUIS SLATKIN, and MURRAY MELZAK. *Arithmetic for Business Training.* Globe Book Company, New York, 1936. 163 pp.

The authors believe this book to be the first attempt to place in a separate text arithmetic problems designed specifically to correlate with general business training topics. The purpose of this publication is to provide more material than is to be found in business training texts which, in their attempt to integrate commercial arithmetic and business training, usually provide only a meager supply of pertinent problems.

The problems permeate live situations on a suitable level which is the result of experimentation by the co-authors: persons engaged in junior high school education. The range of problems is such as to make success possible for the slower pupils as well as to present stimulation for the more capable students.

The text is well illustrated with business forms, the same forms used in business training books. This tie-up permits excellent coherence of subject matter. Each series of problems is prefaced with simple, relevant reading matter. A dictionary of usuable business terms concludes the book.

Arithmetic for Business Training contains ample material of the correct kind to be used as a basic text for business mathematics even though that was not the purpose for its creation.

—Ruth Temple
Laboratory School
Indiana State Teachers College

CUFF, NOEL B. *Educational Psychology.* The Standard Printing Company, Louisville, 1936. 287 pp.

In this new text one is impressed by its remarkable balance. In selecting the most significant subject matter the author has taken advantage of the combined judgment of a large number of professors of educational psychology in teachers colleges. No topic is treated that is not approved by at least fifty per cent of the experienced instructors consulted. This frees the work from some of the traditional material frequently found and also provides a sensible, modern approach.

The style is clear and interesting. There is no padding. Every sentence counts. The student who has the habit of underlining important statements would need to mark a goodly portion of this text. Furthermore, the most recent and reliable findings in educational research are freely used. The lists of references at the end of each chapter are really selected and make possible as extended a treatment as the instructor desires. Every chapter is also supplied with objective tests and many of them have sets of problems. The author has succeeded in presenting in a practical way the most significant phases of educational psychology.

—Edward L. Abell
Indiana State Teachers College

TIPPETT, JAMES S. *Schools for a Growing Democracy.* Ginn and Company, Boston, 1936. 338 pp.

In the spring of 1927, the Parker School District launched "a determined effort to make the work of the schools contribute more effectively to the development of all the possibilities in each child and to the harmonizing of school life with the demands of society." At this time, Dr. Tippetts discussed with the teachers the value of units of work as a technique of instruction and criteria for selecting them. This discussion marked the beginning of an experiment in public school education which has continued over a period of eight years.

Schools for a Growing Society is an account of that experiment. It reveals, chapter by chapter, the evolution of the school as problems were solved and the experiment carried forward. Further, it describes what is happening at present.

This will be a very useful book. It is concrete, well written, and suggestive. The problems solved in the Parker District are those which must be studied by administrators and teachers if a school is to achieve the fundamental goals set up by this group. Examples of such problems are: teacher training, curriculum, materials and relation of school to community. The appendix is an innovation in that it provides a limited selective bibliography and answers to frequently asked questions.

It has already helped the writer of this review to answer this question from the field, "What can I, as principal, do to help my teachers make our school a more profitable place for children?"

—Mary D. Reed
Indiana State Teachers College

WATTENBERG, WILLIAM W. *On the Educational Front.* Columbia University Press, New York, 1936. 218 pp.

The teaching profession is now debating the best way to organize for the protection and advancement of education. Should all educators—from the kindergarten teacher to the superintendent—be in one all-inclusive organization? Should teachers form trade unions, affiliated with organized labor? Should classroom teachers and principals organize exclusively of each other?

This book is an analytical history—a study in social psychology—which investigates what happened to teachers' associations in New York and Chicago during the retrenchment drives of 1933, 1934, and 1935. About two hundred organizations, of all types, were studied.

The book opens with a description of the settings in which the organizations operated and an analysis of the retrenchment drives. Then, the organizations are described; the ways in which they are governed, the roles assigned to the average members, and the leadership are all treated. The conflict among the groups, and the alliances uniting them, as well as the influence of outside forces, are discussed. Finally, an analysis is made of the strategies employed.

How Shall We Educate Teachers and Librarians for Library Service in the Schools? Columbia University Press, New York, 196. 74 pp.

This book is composed of the findings and recommmendations of the joint committee of the American Association of Teachers Colleges and the American Library Association with a library science curriculum for teachers and teacher-librarians.

The report includes a brief survey of types of library instruction currently available and a statement and discussion of the principles that the committee believes should guide teachers colleges and library schools in the organization of library science instruction in this specialized field.

Teacher Retirement Legislation for Kentucky. Bulletin of the Bureau of School Service, College of Education, University of Kentucky, Lexington, Kentucky, September, 1936. Volume IX, Number 1. 106 pp.

TOWNSEND, MARY E., AND ALICE G. STEWART. *Guides to Study Material for Teachers.* The H. W. Wilson Company, New York, 1936. 110 pp.

This is the first number of the Social Science Service Series which aims to provide timely, authoritative, inexpensive, and practical guides in handy form to all kinds of material and aids for the teaching of history and the social studies.

BLANTON, ANNIE WEBB. *The Child of the Texas One-Teacher School.* The University of Texas Bulletin, No. 3613, University of Texas, Austin, Texas, April 1, 1936. 108 pp.

Handbook in Curriculum Development for Louisiana Schools. Prepared by Class in Education 270, Curriculum Studies, Louisiana State University, 1936, under direction of Dean C. A. Ives. Mimeographed. 17 circulars bound in one.

The National Association of Deans of Women annual meeting will be in New Orleans, Louisiana February 18-22, 1937. Dr. Ada L. Comstock, president of Radcliffe College, will be one of the principal speakers.